

STATE OF MICHIGAN
COURT OF APPEALS

J & B SAUSAGE COMPANY,

Plaintiff-Appellant,

v

DEPARTMENT OF MANAGEMENT &
BUDGET and DEPARTMENT OF EDUCATION,

Defendants-Appellees.

UNPUBLISHED

January 4, 2007

No. 259230

Court of Claims

LC No. 04-000091-MK

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right an order of the Court of Claims granting summary disposition to defendants on its breach of contract and breach of duty of good faith and fair dealing claims. We affirm in part, reverse in part and remand.

Plaintiff and defendants entered into two agreements for the processing of United States Department of Agriculture (USDA) donated pork. The first agreement, the "Processing Agreement," was "for the processing of . . . [USDA] donated commodity Pork Picnics into Fully Cooked Morning Sausage Rolls for the Michigan Department of Education for use by various schools across the State of Michigan." The second agreement, the "Ancillary Agreement," outlined the various requirements plaintiff was to adhere to in the actual processing of this pork.

The parties commenced performance under these agreements. Defendants ordered and caused 40,000 pounds of USDA pork to be delivered to plaintiff. Plaintiff processed this first shipment into 8,491 cases of sausage rolls. Pursuant to the terms of the agreement, defendants then ordered delivered approximately 1,600 of these cases, the balance remaining in storage in plaintiff's care, until further ordered deliveries. Defendants then ordered and caused an additional 40,000 pounds of USDA pork to be delivered to plaintiff for further processing. Plaintiff processed this second shipment into 8,117 cases of sausage rolls. The approximately 15,000 remaining cases remained in storage in plaintiff's care, pursuant to the agreement.

Thereafter, defendants sent plaintiff a letter indicating that, due to budget constraints, they were requesting a price reduction on the agreement. Plaintiff rejected defendants' request and, over a period of communications, demanded delivery of the remaining sausage rolls. Defendants made no further requests for such deliveries. Plaintiff then tendered the sausage rolls to defendants; defendants essentially ordered them delivered to various food banks. Plaintiff

then instituted the instant litigation, claiming breach of contract and breach of a duty of good faith and fair dealing. Defendants sought summary disposition, which the Court of Claims granted.

I

As a threshold matter, we must determine whether this agreement is governed by general common law contract principles or the Uniform Commercial Code (UCC), MCL 440.1101 *et seq.* Article 2 of the UCC governs “transactions in goods.” MCL 440.2102. Contracts for services are governed by the common law. *Citizens Ins Co v Osmose Wood Preserving*, 231 Mich App 40, 45; 585 NW2d 314 (1998). Where a contract is mixed, providing both goods and services, or is otherwise unclear, our Supreme Court has examined it under the “predominant purpose” test to determine whether to apply the common law or the UCC. *Farm Bureau Mut Ins Co v Combustion Research Corp*, 255 Mich App 715, 722-725; 662 NW2d 439 (2003).

“The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved” [*Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 534; 486 NW2d 612 (1992), quoting *Bonebrake v Cox*, 499 F2d 951, 960 (CA 8, 1974).]

The Court has further instructed:

A court faced with this issue should examine the purpose of the dealings between the parties. If the purchaser’s ultimate goal is to acquire a product, the contract should be considered a transaction in goods, even though service is incidentally required. Conversely, if the purchaser’s ultimate goal is to procure a service, the contract is not governed by the UCC, even though goods are incidentally required in the provision of this service. [*Id.* at 536.]

This issue is generally one of fact. However, “[w]here there is no genuine issue of any material fact regarding the provision of the contract, a court may decide the issue as a matter of law.” *Frommert v Bobson Constr Co*, 219 Mich App 735, 738; 558 NW2d 239 (1996).

We conclude that this agreement was predominantly for services. It was “for the processing of . . . [USDA] donated commodity Pork Picnics into Fully Cooked Morning Sausage Rolls.” This is a service agreement. Defendants had pork delivered to plaintiff, which was processed, and then returned to defendants. See *Insul-Mark Midwest, Inc v Modern Materials*, 612 NE2d 550, 554-557 (Ind, 1993) (holding that a contract for the rust-proofing of delivered and returned screws was one for service); *Wells v 10-X Mfg Co*, 609 F2d 248, 255 (CA 6, 1979) (holding that a contract for the provision of “manpower and machine capabilities for production of a hunting shirt,” with materials supplied by the buyer, was a service contract). Plaintiff acquired no ownership over the pork. The parties agreed that the contract would be a “fee-for-service” agreement, representing plaintiff’s “cost of ingredients (other than donated pork), labor, packaging, overhead, and other costs incurred in the conversion of the donated pork into the

specified end product.” Defendants’ ultimate goal was to have the pork processed. Thus, the common law governs our analysis.

II

Plaintiff first argues that the Court of Claims erred in concluding that the parties’ agreement was a requirements contract. We agree. We review rulings on motions for summary disposition de novo. *McClements v Ford Motor Co*, 473 Mich 373, 380; 702 NW2d 166 (2005). A motion brought pursuant to MCR 2.116(C)(10) entitles the movant to summary disposition where there is no genuine issue of material fact. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). We consider “the pleadings, depositions, admissions, and documentary evidence” submitted by the parties in the light most favorable to the non-moving party. MCR 2.116(G)(5); *Nastal v Henderson & Assoc*, 471 Mich 712, 721; 691 NW2d 1 (2005). Also, issues of contract interpretation are questions of law we review de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Our primary obligation is to discern and effectuate the parties’ intent. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). Unambiguous contract language is enforced as written. *Id*.

A requirements contract is one in which “the quantity term is not fixed at the time of contracting [and t]he parties agree that the quantity will be the buyer’s needs or requirements of a specific commodity or service” over the life of the contract. Corbin, *Contracts* (rev ed), § 6.5, p 240. While the UCC expressly validates such agreements, see MCL 440.2306(1), Michigan courts have historically recognized the validity of “requirements” contracts. *E G Dailey Co v Clark Can Co*, 128 Mich 591; 87 NW 761 (1901); *Hickey v O’Brien*, 123 Mich 611; 82 NW 241 (1900). Such contracts are accordingly creatures of the common law and may be recognized in the context of service agreements governed by the same.

Historically, requirements contracts that have been validated have included express language indicating the nature of the agreement. For example, this Court, in the context of a tin can supply agreement, concluded that a manufacturer had agreed to provide another “with all that it would use,” while the latter “agreed to buy all the cans it would use” in the business at issue. *E G Dailey, supra* at 594. In *Hickey v O’Brien*, in the context of an agreement for the sale of ice, one party agreed to supply another “with all the ice that they [sic] may require to carry on their ice business,” and the other agreed to purchase “all the ice necessary to carry on their [sic] ice business.” *Hickey, supra* at 612.

In finding there was a requirements contract here, the Court of Claims relied upon the following language in the agreement:

Exact quantities to be purchased are unknown. . . . Quantities specified, if any are estimates based on prior purchases and/or anticipated USDA shipments, and the State is not obligated to purchase in these or any other quantities. It is anticipated that 1 truck of Pork Picnics will be available to the processor. . . . If as in the past, Pork Picnics are purchased, the contractor shall be responsible for processing the Pork Picnics according to the attached requirements. The state is not obligated to request processing in these amounts or any other quantities.

Read as a whole, and in context, this language governs the procurement of raw pork from the USDA; it does not establish a quid-pro-quo quantitative relationship between the parties. *Hickey, supra* at 612; Corbin, Contracts (rev ed), § 6.5, p 240; see also *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003) (construing contracts as a whole). The first sentence indicates that the amount of USDA pork the parties agreed to process was undefined. The second sentence is informed by the first through a contextual relationship: It indicates that any amounts of USDA pork specified in the contract, such as amounts specified in the sentence that follows, are but estimates of what would be available to plaintiff for processing. The second clause of this sentence, upon which the Court of Claims relied, merely precludes a determination that defendants were obligated to procure *any* USDA pork for plaintiff to process. It does not, despite the court's conclusion, make the purchase of processed pork from plaintiff discretionary, based upon defendants' requirements. *Nagel Precision, supra* at 375. It makes the procurement of *raw USDA pork, for plaintiff's processing*, discretionary. Similarly, the last sentence makes it clear that defendants were not obligated to request *any* pork processing from plaintiff, in amounts estimated or otherwise. Rather than establishing a requirements contract, these two provisions, in conjunction, vitiate any claim that defendants were obligated to employ plaintiff's processing services at all.¹ We therefore conclude that the Court of Claims erred in ruling the parties' agreement to be a requirements contract. Thus, the Court of Claims erred in granting summary disposition for defendants on this basis.

III

Plaintiff next argues that the Court of Claims erred in concluding that it was neither required nor authorized to process any received USDA pork, upon receipt, delivered at defendants' behest. We agree. Again, our primary obligation in contract interpretation is to discern and effectuate the intent of the parties. *Nagel Precision, supra* at 375. Unambiguous contract language is enforced as written. *Id.* As a matter of interpretation, we construe contracts as a whole. *Wilkie, supra* at 50 n 11. We "must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

¹ This does not foreclose a finding that an enforceable agreement existed, however. The above-quoted language specifically indicating that, "[i]f as in the past, Pork Picnics are purchased, the contractor shall be responsible for processing the Pork Picnics according to the attached requirements," and its analytical implications, might appear to render the parties' agreement an illusory promise; defendants were not obligated to do anything in consideration of plaintiff's promise to process received pork. See Restatement Contracts, 2d, § 77, comment a, p 195 ("Illusory promises. Words of promise which by their terms make performance entirely optional with the 'promisor' do not constitute a promise."); *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005) (requiring for contract enforcement competency in contracting parties, legal subject matter, consideration, mutual agreement and mutual obligation). Because, however, defendants allegedly ordered that USDA pork be delivered to plaintiff for processing, supplying the necessary consideration, an enforceable agreement exists based upon this course of performance. See *Shepherd Hardwood Products Co v Gorham Bros*, 225 Mich 457, 465; 196 NW 362 (1923); *Cooper v Lansing Wheel Co*, 94 Mich 272, 276-277; 54 NW 39 (1892).

The parties' agreement provides, in the context of defendants' proposed procurement of pork, that "[i]f as in the past, Pork Picnics are purchased, the contractor shall be responsible for processing the Pork Picnics according to the attached requirements." This provision unambiguously required plaintiff to process any USDA pork it received, according to the contract terms. See *Oakland Co v State*, 456 Mich 144, 155 n 10; 566 NW2d 616 (1997) (employing the presumption that "shall" is mandatory). A logical construction of the clause "according to the attached requirements" is necessarily broad, encompassing both the balance of the Processing Agreement as well as the Ancillary Agreement. *Nagel Precision, supra* at 375; *Wilkie, supra* at 50 n 11. The latter expressly governs the particulars of pork processing, including for example, pork processing and handling procedures, processing quality control, packaging, and distribution. The former generally governs the parties' relationship, outlining the requirements and rights of each, including quality of the processed product, service and distribution, general contracting requirements, and contract termination. Defendants argue that the above language "imposes an obligation that is subject to other requirements in the Processing Contract, and does not authorize [plaintiff] . . . to commence processing without regard to other considerations." Yet defendants fail to identify what "other requirements" or "other considerations" in the agreement limit plaintiff's duty to process according to the preceding clause. Indeed, no such limitations are present. The foregoing language is accordingly sufficient to conclude that the Court of Claims erred in ruling that the parties' agreement neither authorized nor required plaintiff to process the pork it received. However, it need not be construed to require plaintiff's processing of pork *upon receipt*.

The parties' agreement further provides:

The contractor [plaintiff] shall only process the amount of commodity delivered by USDA as directed by [defendant Michigan Department of Education (MDE)] or designee. The contractor should not anticipate the receipt of additional product. No production in excess of delivered amount of USDA commodity food should occur unless directed and authorized by MDE.

The first sentence requires plaintiff to process amounts of pork delivered by the USDA at the behest of defendants, *and only that commodity delivered*. In other words, only defendants could direct USDA pork to be delivered, and only that pork directed by defendants for delivery could be processed by plaintiff. The third sentence reinforces this, recognizing that defendants retained the option to authorize production above and beyond that USDA pork they ordered delivered. *Nagel Precision, supra* at 375. Implicit in these provisions is that plaintiff was obligated to process any received USDA pork. Indeed, the third sentence is rendered surplusage unless it is understood that plaintiff was authorized and obligated to process any pork received *upon receipt, without defendants' further authorization*. Otherwise, no circumstance would arise in which plaintiff would process pork independent of defendants' express, contemporaneous authorization to do so, obviating any need to limit plaintiff's processing authority to existing USDA inventory. *Klapp, supra* at 468. Plaintiff was thus to process any received USDA pork *upon receipt, without further authorization from defendants*.

The Court of Claims concluded that, because the parties' agreement permits defendants to order that USDA pork be processed into other pork products, apart from morning sausage rolls, plaintiff's processing the entire shipment precluded defendants from exercising their contractual rights. This determination was in error. "A cardinal principle of construction is that a contract is to be construed as a whole, and all parts are to be harmonized as far as possible." *Czapp v Cox*, 179 Mich App 216, 219; 445 NW2d 218 (1989). Language in the agreement permits defendants to modify the agreement so as to order plaintiff to process received USDA pork into any one of plaintiff's various products. This provision can be implemented prior to defendants' order of USDA pork; it can be implemented midway through plaintiff's production. In other words, plaintiff's beginning production upon receipt of USDA pork may have precluded implementation of this language *with respect to product already processed*, but it does not preclude such implementation *altogether*. The Court of Claims' construction of this section failed to construe it in harmony with other contract provisions. *Id.* It was accordingly erroneous.

Defendants argue that, because plaintiff was required to store unprocessed USDA pork for extended periods of time, it follows that plaintiff was not required to process such pork upon receipt and without their further authorization. In support of this position, defendants marshal a litany of contract provisions directly or tangentially relating to the storage of unprocessed USDA pork. They misapprehend and misconstrue these various provisions, however. That plaintiff was contractually obligated to provide raw pork storage does not speak to any required authorization for processing. A construction in harmony with other contract provisions is that plaintiff was required to provide appropriate storage facilities for raw USDA pork during its processing of the same. *Czapp, supra* at 219. That plaintiff was required to maintain a raw pork inventory for production, to report its inventory use to defendants, and to furnish a security bond for any pork it received, does not preclude a determination that plaintiff was both authorized and required to process the USDA pork upon receipt. Our construction gives effect to every provision in the agreement. *Klapp, supra* at 468.

Defendants further argue that because the Ancillary Agreement gives them "the option of transferring donated pork rather than requiring . . . [plaintiff] to process all of it," plaintiff could not have been required to process all the USDA pork it received. Again, defendants misconstrue the meaning of the language they reference. Rather than permit defendants to transfer USDA donated pork from plaintiff to other entities, the Ancillary Agreement precludes plaintiff from transferring the same. It is not an affirmative grant of authority, but a negative restriction on it. *Nagel Precision, supra* at 375.

IV

Plaintiff next argues that it was entitled to summary disposition, pursuant to MCR 2.116(C)(10), on its breach of contract and breach of duty of good faith and fair dealing claims. We disagree. In order to prevail on a motion for summary disposition under MCR 2.116(C)(10) on a breach of contract claim, plaintiff must establish both the elements of a contract and the breach of it. *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). "In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991); *Hess v Cannon*

Twp, 265 Mich App 582, 592; 696 NW2d 742 (2005). Plaintiff must then demonstrate a breach of the parties' agreement, see *Baith v Knapp-Stiles, Inc*, 380 Mich 119, 126-127; 156 NW2d 575 (1968), and damages. See *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 6-8; 516 NW2d 43 (1994).

Plaintiff has failed to establish that no genuine issue of material fact remains as to whether defendants breached the parties' agreement.² The Processing Agreement provided as follows:

Deliveries shall be made as requested by the Department of Education or their [sic] designee as indicated. The Contractor [plaintiff] shall deliver the finished products to the warehouses. The state reserves the right to add, delete or change distribution centers and/or percentages of usage during the course of the Contract period or extension thereof. Other specific delivery requirements will be made between each warehouse and the Contractor. Deliveries may be required weekly, bi-weekly or on a monthly basis.

* * *

The contractor shall store products processed until ordered by warehouses.

As evidenced by plaintiff's pleadings, the parties' course of performance broke down. Plaintiff alleges that this breakdown was caused by defendants' letter requesting a price reduction. The subsequent course of performance is unclear, however. Communications between the parties have been alleged but not fully documented in the record. Plaintiff's tender of the goods occurred approximately 11 months after defendants' letter was sent. There is no indication what occurred in the interim. The parties' contract is clear: plaintiff was required to store the processed pork until such time as it was ordered by defendants. At the same time, defendants were obligated to order sausage rolls and remit payment for plaintiff's service. While defendants' letter requesting a price reduction evinces uncertainty in their future performance, the record does not disclose whether, through subsequent communications or otherwise, defendants repudiated their obligations under the agreement. See e.g., *Stoddard v Manufacturers Nat'l Bank*, 234 Mich App 140, 163; 593 NW2d 630 (1999) (discussing anticipatory repudiation). The record is insufficiently developed from which to conclude that defendants breached the parties' agreement. Because genuine issues of material fact remain, summary disposition is not appropriate. *Miller, supra* at 246.

Plaintiff likewise argues that it was entitled to summary disposition on its breach of a duty of good faith and fair dealing claim. However, "Michigan does not recognize a claim for breach of an implied covenant of good faith and fair dealing." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 476; 666 NW2d 271 (2003). Plaintiff's claim was properly dismissed.

² It is therefore unnecessary for us to determine whether plaintiff has satisfied the *Thomas* elements. *Thomas, supra* at 422.

We affirm the denial of summary disposition in favor of plaintiff, reverse the grant of summary disposition in favor of defendants, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder